(2)

No. 89-1629

In The

Supreme Court of the United States

October Term, 1989

SALVE REGINA COLLEGE,

Petitioner,

v.

SHARON L. RUSSELL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF FACTS

Most of the salient facts are set forth in the Joint Statement filed February 13, 1987, Par.3(a) through (nn) thereof. 2 App. Vol. I, pp. 73(a)-85(a).[1] They are amplified by the Petitioner in its Petition for Writ of Certiorari to this Honorable Court, but, of course, are presented in a light favorable to it. Since the issue here is not one of fact, but of law, we do not attempt to review them in detail but

[1] References herein are to the Joint Appendix in the record on appeal to the First Circuit.

merely synopsize them to the extent we feel necessary to complete and set for record straight.

In the Fall of 1982, the Plaintiff, Sharon L. Russell, a resident of East Hartford, Connecticut, entered the defendant, Salve Regina College, a religiously-oriented school of higher education, incorporated in Rhode Island and located in Newport, Rhode Island, as a freshman. Prior thereto she had filed with the college a health form indicating her height of 5' 6" and weight of 280 lbs. Throughout her entire college career, Sharon had a "weight problem" in that although she was continually trying to lose weight through diet and exercise, she nonetheless continued to gain weight. At one point she weighed as much as 335 pounds.

Her academic performance as a freshman was satisfactory and toward the end of that year she applied for and was granted permission to enter the college's nursing program.

Throughout her sophomore year, she experienced numerous instances when her weight, and health issues allegedly associated therewith, were the subject matters of comment by and with various faculty members. In addition there were many instances when she was humiliated by her instructors in the presence of her peers.

Her academic performance throughout her second year of college was again satisfactory, and she was admitted to full status in the nursing program.

In the Fall of 1984 she embarked upon her junior year, including certain so-called "clinical courses" – actual field experiences in a hospital setting, under the

tutelege and guidance of her professors and instructors. During the first semester of that junior year, she had two "clinical instructors", one Mary Lavin and Sandra Watters. Watters found Sharon to be an outstanding nursing student (See Plaintiff's Exhibit 36, App. Vol. III pp. 1215a-1225a), and under date of 12/13/84, she wrote therein of Russell "Sharon has demonstrated her ability to become an excellent student. She excels in professionalism, technical skills, communicates with patients and in teaching skills. RBS Staff members have also commented on Sharon's nursing excellence."

On the other hand, Lavin was of the opinion that Russell should be flunked out of the program. Her evaluation, (Plaintiff's Exhibit 37, App. Vol. III pp. 1226a-1236a) was that "the areas that are unsatisfactory are directly related to her weight problem."

On December 18, 1984, Sharon was told by Catherine E. Graziano, Dean of the Department, that by virtue of Lavin's unsatisfactory grading of her performance she could not continue in the nursing program. A serious dispute exists as to what happened next concerning the facts of how a certain 'contract' came to be. In any event the confrontation resulted in Sharon's signing the 'contract' dated December 18, 1984, (Plaintiff's Exhibit 38, App. Vol. III, p. 1237a), by the terms of which she agreed to lose a minimum of two pounds per week. It was made clear to Sharon that the signing of the contract was a *sine qua non* to her continuing in the nursing program. As Sharon said she was told 'if you don't sign this, you don't come back in the nursing program after Christmas' (App. Vol. I, p. 233a, lines 13-15).

Thereafter, through the late winter and spring of 1985, Sharon attended weight loss programs and reported religiously to Joan Chapdelaine, who was the faculty member assigned to monitor Sharon's program. Moreover, she actually achieved 'Dean's List' status during that academic semester. (App. Vol. I, p. 235a-237a). In fact at the end of her junior year in May 1985 her monitor felt Sharon was in performance of her contract and was doing 'her very level best' to live up to her contract (App. Vol. II, pp. 750a, lines 2-8). On July 25, 1985 Sharon and her mother came to Newport, Rhode Island and hired an apartment for Sharon to occupy during her senior year, and in fact, began to furnish the same. That same day they visited Mrs. Chapdelaine (App. Vol. I, pp. 259a-260a) and Mrs. Russell learned for the first time of the existence of the so-called 'contract' of December 18, 1984. She also learned from Mrs. Chapdelaine that her daughter 'did not fit the image of Salve Regina College'. (App. Vol. I, p. 260a lines 12, 13, 14).

Sharon's career at Salve Regina College came to an abrupt end on August 21, 1985 when Joan Chapdelaine, after conferring with Dean Graziano, (App. Vol. II, p. 766a) wrote a letter to Sharon (Plaintiff's Exhibit 59, App. Vol. III, p. 1273a) saying ' . . . , I have removed your name from 411 in accordance with your agreement to "voluntarily" withdraw from the nursing program if conditions were not met.'

Not long thereafter sometime in the fall of 1985 after conferring with counsel, the instant proceeding was commenced.

Travel of the Case

As a result of the action of the district court, all counts but one, the breach of contract count, of the Respondent's Amended Complaint were dismissed and no longer form a part of this litigation.[2]

The trial justice submitted the case to the jury on the sale question of whether there had been a breach of contract. From a verdict in favor of the Respondent, the Petitioner appealed to the Circuit Court of Appeals for the First Circuit. The Court denied the Appeal,[3] and it is from that action that the instant Petition for Certiorari has been filed.

This Honorable Court has requested the Respondent to file a response to the Petition.[4]

---

[2] The counts alleging handicap discrimination, denial of due process and unconstitutional interference with Respondent's liberty and property interests, negligent infliction of emotional distress, wrongful dismissal, and violation of implied covenants of good faith and fair dealing, were dismissed by the district court upon Petitioner's motion for summary judgment.

The trial justice granted the motion of the individual defendants for a directed verdict on all claims against them, and also directed a verdict in favor of Petitioner on the counts alleging intentional infliction of emotional distress and invasion of privacy.

[3] 890 F.2d 484 (1st Cir. 1989)

[4] Letter of the Clerk dated May 9, 1990 to counsel of record.

Response

1. The district court did not err when it ruled the doctrine of "substantial performance" applicable to the case at bar.

2. The jury was justified in finding the Petitioner guilty of a breach of contract.

3. The Circuit Court of Appeals did not commit error when it affirmed the judgment in favor of the Respondent on the breach of contract count.

ARGUMENT

I. This is not a case of student vs. academia.

II. The doctrine of substantial performance was correctly held applicable to the case at bar.

III. The jury was justified in finding for the Respondent.

IV. The Circuit Court of Appeals did not commit error in affirming the action of the trial justice and jury.

A. The standards for appellate review have been established by this Court.

B. The Circuit Court's ruling concerning the applicability of the doctrine of substantial performance was in keeping with its well established rules of review on appeal in diversity of cases where the trial justice has ruled upon a state-law issue.

C. The alleged dichotomy between various Circuit Courts concerning the standard of review that should be adhered to by said Circuit Courts in ruling on state-law questions as determined by the district courts in diversity cases is more apparent than real.

I. This is not a case of student vs. academia.

In reviewing the case at bar it is necessary, in the first instance, to have in mind at all times, the precise nature of the "contract between the parties". We do not have here the usual situation of a contract, implied in law, from the usual documents of an application for admission, college or university handbooks which set forth academic standards to be achieved and/or maintained, disciplinary rules and regulations to be adhered to, and the simple payment of fees and expenses. Here the "contract" by action of the parties has become unique and special. The document of December 18, 1984, Respondent's Exhibit 38 (set out in Petitioner's Appendix to its Petition herein) renders the contract between the parties something special, or "one of a kind". Even the Petitioner's Dean of Nursing agrees that the December 18, 1984 "contract" was special. At Appendix Vol. II p. 709a, we find the following:

> "Q Dean Graziano, how many students have you entered into a weight loss contract with?
>
> A I don't recall.
>
> Q Anyone ever than Sharon?
>
> A No, I don't believe so.
>
> Q So that this is a unique document, is it not?
>
> A Yes, it is.
>
> Q Not duplicated neither before nor since.

A Not that I can recall."

The Trial Justice found the instant contract 'special' when on April 14, 1989 (Trial day No. 7) he said at App. Vol. II, page 891a:

> "This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties."

We are therefore dealing, not with the usual case of a student complaining of a failing grade or one accused of some disciplinary infraction such as "cheating". Rather, we are dealing with an honor student who failed to lose as much weight as she promised she would do over a given period of time. Quite a different thing than a flunking medical or law student, or one who has deliberately cheated on an examination or plagerized his or her thesis or a test essay. We are involved with a most unique situation – one for which we have been unable to find a precedent, although we have "searched the books high and low" for guidance. The invasion by the College and its faculty into the Respondent's private life is the distinguishing factor in this litigation.

II. The doctrine of substantial performance was correctly applied to the case at bar.

We recognize that the question of whether the doctrine of substantial performance was correctly applied to the case at bar by the trial justice is not technically before the Court on the instant Petition. However, the approval

thereof by the Circuit Court of Appeals is questioned by the Petitioner, insofar as it complains that the Circuit Court did not give the question plenary view.

In its "Summary" on Page 11 of its Petition, the Petitioner alleges that the District Court "created a novel and highly troubling rule of State law" in the face of relevant decisions of the Rhode Island Supreme Court. At pages 21 and 22 of its Petition, we learn that in its view, the Rhode Island Supreme Court has in the case of *National Chain Co. v. Campbell*, 482 A.2d 132 (R.I. 1985) and *Ferris v. Mann*, 99 R.I. 630, 210 A.2d 121 (1965) "long limited the application of the doctrine of 'substantial performance' to construction contract cases". Nothing in either of those cases, which admittedly are construction cases, limits the application of the doctrine to building contracts. The Rhode Island Supreme Court has not declared itself as to the doctrine's applicability to other classes of cases. There is nothing in any reported Rhode Island Supreme Court case which can be construed as indicating that that Court would do other than follow the general trend throughout the country and hold the principal to be controlling in a broad range of situations. As said in 17 Am. Jur. 2d Contracts §375 pp. 819 and 820:

> "While the doctrine of substantial performance is applied most frequently in building and construction contracts, it is not so limited and may be applied in the case of any kind of contractual obligation to perform."

In *Division of Labor Law Enforcement v. Ryan Aeronautical Co.*, 106 Cal. App. 2d Supp. 833, 236 P.2d 236, 30 A.L.R.2d 347 (1951), an employee, who had worked all but 8 days of a required full year of employment under a

collective bargaining agreement that called for vacation pay after "completion of a year's service", and whose employment was terminated without fault on his part, as a part of employer's reduction of work force for economic reasons, was held, by the application of the doctrine of specific performance, to be entitled to the vacation pay. There the California Appellate Department of Superior Court said, at page 350 A.L.R. 2d:

> "Substantial compliance, it has been said, meets the requirements of *any obligation* and what acts may constitute a compliance sufficient to meet the requirements of the law is a question to be determined on the facts in each individual case." (Emphasis supplied).

The respondent argues vigorously that the doctrine of substantial performance is not, or at least in its view of things should not be, applicable to the case at bar. Respondent has been assiduous and repetitive in espousing the position that only complete and precise compliance with every single facet "between the parties" is necessary before the Respondent can have relief. It goes on at great length about the necessity of institutions of higher learning having academic freedom to preserve their high and lofty goals and the ability to protect the integrity of the degree system and even in turn to thus protect the public from unqualified and unscrupulous graduates going about pandering their deficient knowledge and training. All of that very laudable position is wholly beside the point in this case. Every case cited by the Petitioner in its Petition in support of its position in the case at bar are cases involving questions of academic qualification and/or disciplinary measures or matters involving breach of an honor code or dishonesty violations of one type or another.

Slaughter v. Brigham Young University 514 F.2d 622 (10th Cir. 1975) was a simple case of academic dishonesty. The issue of how to interpret a "special" or "unique" contract between the school and pupil was not involved. Here Dean Graziano agreed that the "contract" with Sharon was "unique".

Sofair v. State University of N.Y., 54 A.D.2d 287, 388 N.Y.S.2d 453 (1976), as do so many of the cases, deals with an academic failure of a medical student. *Olsson v. Board of Higher Education*, 49 NY 2d 408, 402 NE2d 1150, 426 N.Y. Supp. 2d 248 (1980) falls into the same category of evaluating a student's academic qualifications.

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) again deals with academia and not a special or unique contract. *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir. 1988) is another academic qualification case and does not in any way deal with a special or unique addendum to the usual student-institutional relationship.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S. Ct. 507 (1985) involved a student who was dismissed for failing an important written examination. *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978) dealt with a student who had been dismissed for failure to meet academic standards. *Clayton v. Trustees of Princeton University* 608 F. Supp. 413 (D. N.J. 1985) involved a case of a student cheating on an examination which constituted a breach of a student's honor code."

Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977) cert. den. 435 U.S. 971 (1978), was similarly a case arising out of a straight academic failure. It centered

about the issue about whether a three-member "appeals committee" recommendation to change a failing grade was binding on the Dean of the Nursing Department. There the Circuit Court reversed a finding by the District Court that the College had breached its agreement with the student when the Dean rejected the "recommendation". As in so many other cases cited by the Petitioner, the Court was there dealing with an academic failure.

The Trial Justice on three (3) separate occasions dealt with the doctrine and its application to the case at bar. His bench decisions at the conclusion of the Respondent's case; at the end of the Petitioner's case; and his charge to the jury in that regard are set out in Appendix A hereto. He properly applied the doctrine to the instant case.

III. The Jury was justified in finding for the Respondent.

The evidence of Sharon's performance of the "contract addendum" is really at the heart of this inquiry, and in this regard Joan Chapdelaine's testimony on cross-examination is most enlightening. At pages 72 and 73 of the transcript for April 13, 1989 (Trial Day 36) (App. Vol. II, pp. 749a & 750a) we find the following:

"Q Now, you knew what had been the experience between the date of giving her the admit card and the time she went home in May, didn't you?

A Yes, I did.

Q And at that time, you didn't pull the admit card, did you?

A No. I had every belief that Sharon was committed to fulfilling the terms of the contract. I was very positive at that time when I gave her that.

Q So that it's true that at the time she went home in May, you were satisfied that Sharon was doing her very level best to live up to her contract with the school, isn't that true?

A At that particular point in time, yes, I was.

Q *Okay. So now we have Sharon in the performance of her contract where she went home at the end of her junior year, right?*

A *Yes (Nodded).*" (emphasis supplied)

The status on July 25, 1989 as critical because nothing happened between that date and August 21, 1989 the date of dismissal, that added to anyone's fund of knowledge. In this regard, see Dean Graziano's testimony on cross-examination, page 26 of the transcript for April 13, 1989 (Trial Day #6) (App. Vol. II p. 703a)

"Q Now, Mrs. Graziano, you haven't yet told me what Mrs. Chapdelaine referred you (to) as facts that occurred between July 25, 1985 and August 21, 1985, when she said to you Sharon is not living up to the contract. Now what were those additional facts that Mrs. Chapdelaine told you, if any?

A I don't recall any.

Q None. So that she was going back really to what had happened and what she knew as of July 25, isn't that true?

A That's very possible. She was monitoring the contract. I was not."

On July 25, 1989 Sharon and her mother met with Joan Chapdelaine at her office in Salve Regina College. Sharon and her mother informed Mrs. Chapdelaine of the fact that Sharon had hired an apartment for the upcoming year and she was planning on returning to the Nursing Program for the upcoming year. Mrs. Chapdelaine said something about there being some question as to Sharon not having fulfilled her "contract" and yet allowed both Sharon and her mother to leave that conference believing that Sharon was going to go into her Senior year in good standing. With no further information, data or contact, Mrs. Chapdelaine, did, on August 21, 1985, summarily, but in cooperation with Dean Graziano, dismiss Sharon from the Nursing Program. (See page 82 of the transcript for April 13, 1989 Trial Day #6) (App. Vol. II, page 759a, 760a, 761a, 763a & 764a).

"Q Did you have any conversation with Mrs. Russell and/or Sharon about her Newport apartment that they had just come from renting?

A No.

Q They didn't tell you that?

A Yes, they did.

Q So you knew that Sharon had rented an apartment that day for the fall term at Salve Regina, did you not?

A They told me they had."

The jury was fully justified in finding that the Respondent had substantially performed her part of the bargain, and that the Petitioner was guilty of a breach of its contractual obligations.

IV. The Circuit Court of Appeals did not commit error in affirming the action of the trial justice and jury.

A. The standards for appellate review have been established by this Court.

The Petitioner seeks to have this Court reverse the Circuit Court because that Court, "(b)ased upon the First Circuit's rule of deferring to interpretations of state law made by federal judges sitting in that state", held that that Court's determination was not "reversible error".[5] The Petitioner further complains of the review it received on its other grounds of appeal, pointing to the Circuit Court's language that it deemed it "appropriate to accord the district court reasonable leeway."[6]

In support of its Petition it relies heavily upon *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984), using it as a predicate to create some alleged dichotomy between the various Circuit Courts as to the standard of review to be accorded on appeal to a district judge's holding as to a state-law issue. The Petitioner attempts to make the alleged conflict in standards into a constitutional issue of the first magnitude.

This Court, in *United States v. Hohri, et al.*, 482 U.S. 69, 107 S.Ct. 2246 (1987) has held that a district judge's determination of a state-law question usually is reviewed with great deference.[7]

This reference to the appropriate standard was made despite *Matter of McLinn, supra*, which was referred to by

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[5] 890 F.2d 484, 489 (1989)

[6] Ibid., at 490

[7] 482 U.S. 69, 74, fn 6

Mr. Justice Powell in his footnote, already cited. See also, *Linsdey v. Normet*, 405 U.S. 56, 83, 92 S. Ct. 862, 879 (1971), (Mr. Justice Douglas, dissenting in part); *MacGregor v. State Mutual Life Assur. Co.*, 315 U.S. 280, 281, 62 S. Ct. 607; *Huddleston v. Dwyer*, 322 U.S 232, 237, 64 S. Ct. 1015, 1018; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204, 76 S. Ct. 273, 277; *General Box Co. v. U.S.*, 351 U.S. 159, 165, 169, 76 S. Ct. 728, 732, 735; and *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 281, n. 2, 70 S. Ct. 1184, 1189 (Mr. Justice Frankfurter, dissenting).

The Petitioner contends that in this case it did not get an adequate review of the district court's ruling concerning the applicability of the doctrine of substantial performance. It says the First Circuit's "deference" rule is at variance with the "de novo" rule espoused in *McLinn, supra*, and that this Court should step in and set the record straight, as to which standard should apply in Circuit Court reviews of district courts' state-law holdings. We submit this whole matter is more one of terminology than substance. The fact is that in virtually every case in which the so-called "deference" rule is stated, the Circuit Court has in reality performed a "de novo" review. We shall deal with this in more detail later.

B. The Circuit Court's ruling was in keeping with its well-established rules of review on appeal in diversity cases where the trial justice has ruled upon state-law issues.

In its opinion,[8] the Circuit Court cited not only its own holding in *Dennis v. Rhode Island Hospital Trust*

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[8] 890 F.2d 484 (1989)

National Bank, 744 F.2d 893 (1st Cir. 1984) in support of the so-called "deference" rule, but also the opinion of the Second Circuit in *O'Rourke v. Eastern Air Lines Inc.*, 730 F.2d 842 (2d Cir. 1984).

Assuming, arguendo, that the appellate court in applying the "deference" rule of "not clear error" or "great weight", based its opinion on an assumption that the district judge had some special knowledge of local law,[9] the question remains, as to how it determines "clear error" or "reversible error". The standards may be easy to express, but they are not so easily applied. We submit that there is no basis to assume that a Circuit Court blindly and slavishly adopts and approves every district court ruling on a state-law issue, simply because in the first instance it gives "deference" or "weight" to that holding. In that instant case, and in every case we have found, the Circuit Court has given full review to those state-law questions before espousing the "deferential" rule as its basis for approval. Here the appellate tribunal followed its own precedents, and those of this Honorable Court.

C. The alleged dichotomy between various Circuit Courts is more apparent than real.

The case at bar is a perfect example of how a "deferential" Circuit Court does in fact give a plenary review to a district court's holding on a state-law issue; in effect giving a "de novo" review, although clothing it in "deferential" robes.

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[9] See, *Matter of McLinn*, 739 F.2d 1395, 1400 (9th Cir. 1984)

Here the Circuit Court carefully considered every case cited by the Petitioner in its brief to that Court, and differentiated each of them from the case at bar. It held that the usual rules applicable to "academia" were not appropriate here, because of the unique aspects of this case. The exact language of the Circuit Court is deserving of careful reading, and we have set it out in Appendix B hereto.

Thus, only after a very careful analysis of the Petitioner's arguments did the Circuit Court, in this case of first impression,[10] approve the district court's state-law question holding. It did, after a "de novo" review of the situation say in effect, "we can find no reversible error" in the district court's ruling.

McLinn, supra, was decided by a very narrowly divided court, with five (5) judges of that Court dissenting. Mr. Justice Schroder's dissent, particularly his comments at pages 1405 and 1406 of 739 F.2d are most compelling and applicable to the case at bar. As he so aptly puts it, "the problem . . . is basically one of terminology."

We respectfully submit that in the case at bar the Circuit Court did not commit error in affirming the district court's determination of the state-law question concerning the applicability of the doctrine of substantial performance. It did not commit error in otherwise affirming the district judge's handling of the issue of damage, since it approved it only after a detailed review of the matter.

[10] 890 F.2d 484, 490 (1989)

CONCLUSION

We respectfully submit that the alleged conflict between Circuits as to the appropriate appellate review standards to be applied in passing upon a district judge's holding as to a state-law question in diversity cases is more imaginary than real; founded upon the mistaken notion that those Circuits which espouse the "deferential" rule adopt the lower court's ruling blindly and without study or thought. In practice, the "deferential" Circuits do give a full and meaningful review of the law questions involved, and only when satisfied that the district judge was correct do they hold him "not clearly wrong", or "not guilty of reversible error".

We respectfully submit that there is no sound reason for this Court to enter this "war of words". The Circuit Courts of all circuits dispense even-handed, well thought out justice, whether they clothe their action in the "de novo" rule in those cases where they feel they must reverse the lower tribunal, or in the "deferential" rule when they are independently persuaded that the trial justice was correct in his legal position.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Bench Comments of Trial Justice
Re: Substantial Performance

At the conclusion of the Plaintiff's case he said at page 92 of the transcript for April 11, 1989 (Trial Day #4): (App. Vol. I p. 523a):

> "It is a very important doctrine in the law of the State of Rhode Island. If the jury can say that the Plaintiff substantially performed her contractual obligations to the college, then they can say that she was wrongfully discharged, or dismissed from her course. If the jury on the other hand determines that there was really no substantial performance, viewing the overall picture, including her obligations under this side agreement, then the jury can determine that the college justifiably dismissed her from the program.
>
> Neither side has talked about substantial performance to this point, but I would expect that they would give me some requests for instructions at the appropriate time on that subject."

At the end of the defendants' case on April 14, 1989, he said at pages 13, 14 and 15 of the transcript for that day (Trial Day #7): (App. Vol. II p. 820a)

> "THE COURT: I understand the defendant's argument that the doctrine of substantial performance should not apply generally in the academic context, and generally when the issue is whether someone has complied with the code of conduct within a college or whether that person has passed or flunked a course, the doctrine of substantial performance should not apply. However, in this case, I have to determine

whether the Supreme Court of Rhode Island if faced with this case would decide whether the doctrine of substantial performance would apply."

" . . . I am satisfied in my own mind that if the Supreme Court of Rhode Island has this particular case to decide, the Supreme Court of Rhode Island would say that the doctrine of substantial performance should apply, and the jury should make a determination of whether there was substantial performance by the plaintiff in this case. Therefore, the jury must make a determination of whether the dismissal of the plaintiff from the nursing program at the time in question, August 21, 1985, was wrongful or not. In other words, whether it was a breach of the college's obligation, because if the plaintiff substantially performed her agreement, all her agreements with the college, then it was a wrongful act on the part of the college to dismiss her from the nursing program, what she had bargained for. So, since I make this determination as a matter of law that I think the Supreme Court of Rhode Island would apply the doctrine of substantial performance to these facts, I therefore will submit the issue of substantial performance to the jury."

Finally for a third time the District Court gave voice to these principles when he charged the jury on April 14 as follows: (Taken from pages 84 and 85 of the transcript of Trial Day 37) (App. Vol. II, pp. 891a & 892a)

"This case is different in that a special contract came into existence between the parties on December 18, 1984. That contract is in writing, and is Plaintiff's Exhibit Number 38, what's been referred to during this trial as the contract. That was a valid and binding contract between the parties.

Whatever view you take of the evidence, it is clear that Sharon Russell was in danger of receiving an unsatisfactory grade in her clinical course taken that fall, the medical and surgical clinical course, whose teacher was Mary Lavin. Rather than have her get an unsatisfactory in that course, it was determined by both sides that she would receive a satisfactory grade if she made the agreements contained in that written contract. The contract was signed by the plaintiff and obviously agreed to by the college through Dean Graziano, and that became a binding contract as part of the overall contractual relationship between Sharon Russell and Salve Regina College.

It is clear and undisputed that on August 21, 1985, Sharon Russell was dismissed from the nursing program because the college through its agents, Graziano and Chapdelaine, asserted that Sharon Russell had not complied with the terms of the contract.

So bringing this case down to its very simplest terms, in order for the plaintiff to recover in this case, the plaintiff must prove to you by a fair preponderance of the evidence that on August 21, 1985, she was wrongfully dismissed from the nursing program.

In order to prove that she was wrongfully dismissed from the nursing program at the time, she has to prove that she performed her obligation, and all obligations, actually, under the contract that she had, with the college, the whole contract. There is no dispute in this case that she performed adequately academically, and to that point she had a passing grade in everything, had maintained the point average that was required, that she had complied with all the rules and regulations and policies of the college, and therefore, the case comes down to the point of

whether she had complied with this special agreement of December 18, 1984.

The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission.

Whether there has been substantial performance of a contract in any particular circumstance is a question of fact for you, the jury, to determine."

APPENDIX B

After analyzing the cases cited by the Petitioner in support of its position that the doctrine of substantial performance should not apply to the case at bar, the Circuit Court proceeded to differentiate the instant case from those so cited, and said:

> "The College, the jury found, forced Russell into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling. As a result, the reasons against applying the substantial performance standard to this aspect of the student-college relationship also become less compelling. Thus, Salve Regina's contention that a court cannot use the substantial performance standard merely because the student has completed 124 out of 128 credits, while correct, is inapposite. The court may step in where, as here, full performance by the student has been hindered by some form of impermissible action."
